No. 06-313

In The
Supreme Court of the United States

DONALD P. ROPER, Superintendent,
Potosi Correctional Center,

Petitioner,

v.

WILLIAM WEAVER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR RESPONDENT

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PETITIONER'S QUESTION PRESENTED

Since this Court has neither held a prosecutor's penalty phase closing argument to violate due process, nor articulated, in response to a penalty phase claim, what the standard of error and prejudice would be, does a court of appeals exceed its authority under 28 U.S.C. § 2254(d)(1) by overturning a capital sentence on the ground that the prosecutor's penalty phase closing argument was "unfairly inflammatory?"

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RESPONDENT'S STATEMENT OF THE CASE

Prosecuting Attorney George "Buzz" Westfall gave his penalty-phase closing argument in this case just weeks after the United States District Court for the Eastern District of Missouri granted habeas corpus relief in another capital case he had prosecuted. *Newlon v. Armontrout*, 693 F. Supp. 799 (W.D. Mo. 1998), *aff'd*, 885 F.2d 1328 (8th Cir. 1989), *cert. denied*, 497 U.S. 1038 (1990). In *Newlon*, the district court held that Westfall's numerous improper sentencing arguments violated the Eighth and Fourteenth Amendments. *Id.* At William Weaver's state post-conviction hearing, Westfall acknowledged he had been aware of the *Newlon* decision at the time of Weaver's trial. *Weaver v. Bowersox*, No. 4:96-CV-2220 CAS (E.D. Mo. May 7, 2003), Pet. App. A-51, n.5. Yet, Westfall's sentencing argument in Weaver's case closely tracked his *Newlon* summation and contained many of the same themes and comments that he had been warned were unconstitutional.[1]

I. WESTFALL'S PENALTY-PHASE CLOSING ARGUMENTS.

Westfall began his closing argument on penalty by asserting that "the State's case [for guilt] . . . , once you thr[o]w out all the smoke screens and evaluated his perjury that his people put on, his guilt was obvious." Pet. App. A-275.[2] Next Westfall made the first in a series of

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[1] Newlon was subsequently sentenced to life imprisonment. Westfall also prosecuted Weaver's co-indictee, Daryl Shurn. His penalty-phase summation in Shurn's case mirrored the arguments in Newlon's and Weaver's cases. The Eighth Circuit granted relief in Shurn's case, holding that Westfall's argument violated Shurn's Eighth and Fourteenth Amendment rights. *Shurn v. Delo*, 177 F.3d 662 (8th Cir.), *cert. denied*, 528 U.S. 1010 (1999). Shurn was subsequently resentenced to life imprisonment.

[2] Westfall's penalty-phase summation had been foreshadowed by a guilt-phase closing argument whose primary theme was that Mr.

(Continued on following page)

comments purporting to draw on his experience and responsibilities as the elected prosecuting attorney to instruct the jury that a death sentence was appropriate for William Weaver:

> I know what my responsibilities are and I know what the right punishment is in this case. So, if I'm wasting my time [in asking the jurors to impose the death penalty], I choose to waste it anyway in an effort to persuade you to do what's right because the death penalty is what's right here.

Pet. App. A-276.

He then turned to a theme that would permeate his opening and rebuttal arguments:

> You've got to remember what we're dealing with here. This is bigger than William Weaver. It's bigger than Daryl Shurn. It's bigger than all of us. . . . It's the crime that strikes right at the core of our society. It scares us all. The execution of witnesses in a Federal Drug case.

Pet. App. A-276-77. Defense counsel's objection was overruled, and Westfall continued:

> It strikes right at the heart of our system. You've got to look beyond William Weaver. This isn't personal. This is business. You people represent the entire community. You represent society. You have to give a message here. You have to tell the William Weavers and the Daryl Shurns of the world, and you have to be willing to look them right in the eye when you do it, that there's a point at which we won't allow you to go. And when you do, prison's too good. It's the death penalty.

Pet. App. A-277.

Weaver's trial counsel, Doris Black, fabricated evidence and suborned perjury. *See, e.g.*, Tr. 1645; 1647; 1649-50; 1658; 1664.

Westfall then turned to another central theme of his closing argument, that jurors, like soldiers, sometimes had a "duty" to "kill."

> Sometimes killing is not only fair and justified, it's right. Sometimes its [sic] your duty. There are times you have to kill in this life and it's the right thing to do. If Charles Taylor had been able to get his gun out that day, would you have said it was right for him to kill Weaver and Shurn? Of course, you would. It would have been self-defense. Well it was right to kill then and it's right to kill him now.

Id. As an added reason for this rightness, Westfall went on to speculate that Weaver would have killed more people if he had not run out of bullets. Pet. App. A-281. Trial counsel's objection that there was no basis in the record for such an argument was overruled. *Id.*

Westfall then offered a variation on his earlier comments regarding the jurors' "duty" to "kill," this time turning "duty" into what he called juror "courage:"

> There are times, jurors, when you have to be hard in this life. You have to be harder than the bad guys. Because if they are harder than us, then all the rules disappear and the jungle prevails and the animals reign in the jungle and we can't have that, not if we want to live in a civilized society where we can walk our streets and protect our property. Sometimes you have to be harder than they are. And this is the kind of case where you're going to have to return that sort of a sentence. . . . You've got to give the message to the Shurns and the Weavers of the world that we just won't tolerate it and we have got the guts to do it and we have got the backbone to do it. . . .

Pet. App. A-282-83. Shortly thereafter, Westfall repeated his "guts" refrain: "I hope you're going to do it. I hope you've got the guts to do it." A-285.

Westfall finished his opening penalty summation by urging the jury to focus not on Weaver as an individual, but on fighting drug dealers:

> This case – I guess it's one that just cries out to you to say protect the community. The drug dealers, they are taking our streets away from us. Are we going to take them back? Are we going to let them have the streets or are we going to fight back? If the drug peddlers are going to run our community, then all is lost. Then there's no point in having jurors. The death penalty applies in some cases. It applies in this case.
>
> . . . [Y]ou've got to go to the jury room and you've just got to toughen up and do what's right, even though it's going to be tough. You've got to say this is bigger than William Weaver. It's not personal; it's business.

Pet. App. A-285-86.

After defense counsel finished her closing remarks, Westfall's final summation recapitulated most of the themes from his first summation. He began by "beg[ging]" again for a message to "the drug dealers, the dope peddlers and the hit men they hire:"

> And I'm going to beg you for the entire community and for society not to spare his life. I'm going to beg you for the right message instead of the wrong message. The right message is life? For an execution? That's the right message? That's the message you want to send to the drug dealers, the dope peddlers and the hit men they hire to do their dirty deeds: Life in prison is what you get when we catch you and convict you. Life in prison? That's the message you want to send to the scum of the world?

Pet. App. A-292-93.

Westfall reiterated Weaver's own lack of significance:

> The one thing you've got to get into your head, this is far more important than William Weaver.

> This case goes far beyond William Weaver. This touches all the dope peddlers and the murderers in the world. That's the message you have to send. It just doesn't pertain to William Weaver. It pertains to all of us, the community. They are our streets, our neighborhoods, our family. The message is death, not life. And you've just got to geer [sic] yourself to that.

Pet. App. A-293-94. Returning to yet another theme in his initial argument, Westfall added, "quite frankly, if you don't sentence him to die in this case, there's no point in having a death penalty." Pet. App. A-294. Defense counsel's objection was sustained. *Id.*

After discussing deterrence, telling the jurors again that they "need to think beyond William Weaver," *id.* at A-295, and arguing that the defendant had shown no remorse, *id.* at A-296, Westfall once more called on his authority and experience as the elected prosecutor: "It's bigger than William Weaver. And you've got to have the guts to do it. I'm the Prosecuting Attorney in this county, the top law enforcement officer in the county. I decide in which cases we ask for the death penalty and in which cases we don't." Pet. App. A-297. Defense counsel's objection was sustained, and the court instructed the jury to disregard the comment, *id.* at A-298, but Westfall persisted, asking

> If a cold-blooded hit on behalf of drug scum isn't enough for the death penalty, then what facts justify it?
>
> I know there's a movie, Patton, and in the movie, George Patton was talking to his troops because the next day they were going to go out in battle and they were scared young soldiers. And he's explaining to them that I know that some of you are going to get killed and some of you are going to do some killing tomorrow morning. And they all knew that. And he was going to try to encourage them that sometimes you've got to kill and sometimes you've got to risk death because it's right. He said: But tomorrow when you reach

> over and put your hand in a pile of goo that a moment before was your best friend's face, you'll know what to do.

Defense counsel objected and was overruled. Pet. App. A-298-99. Westfall concluded:

> He [Patton] said, "You'll know what to do." Well, last July, Charles Taylor's face was a pile of goo and his brains were hanging out. You know what to do. Yesterday, you made the decision with your brain and you made the right decision. Today, you've got to reach down into your belly, because that's where the death penalty comes from; it comes from your belly. You've got to reach down there and say, William Weaver, we sentence you to die. You know what to do. Please have the courage to do it. Thank you.

Pet. App. A-299.

II. DEFENSE COUNSEL'S SUMMATION.

Defense counsel stressed four factors favoring a sentence of life imprisonment without parole: Weaver's relationship with his family and his good character,[3] his adaptability to incarceration,[4] the fact that a life sentence was consistent with the jury's duty to do justice,[5] and the

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[3] *See, e.g.,* Pet. App. A-290: "[Y]ou can consider whether the defendant has two children and a mother in failing health. . . . [Y]ou may consider whether he's worked with young people to encourage them against engaging in crime and using drugs. . . . Is there something salvageable about this human being? And everybody who has spoken has said about William Weaver there's something salvageable. There is good in him."

[4] *See, e.g.,* Pet. App. A-291: "[Y]ou may consider . . . what he's done in jail. He's helped them to read and write . . . But he can reach somebody in that penitentiary. . . . A William Weaver can reach them. . . . And the men respect him. He's stopped fights."

[5] *See* Pet. App. A-292: "[B]ut if you vote for life, you are still doing your duty."

possibility that the jurors had made a mistake in finding Weaver guilty.[6] She also responded briefly to Westfall's argument that the jury should sentence Weaver to death to send a message to drug dealers, suggesting that a life sentence would send a sufficient message. Pet. App. A-292.

III. THE TRIAL COURT'S INSTRUCTIONS.

The trial court submitted to the jury four alleged aggravating factors and eight alleged mitigating circumstances.[7] It instructed that the jury must return a verdict

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[6] *See, e.g.*, Pet. App. A-288: "But what if you're wrong you see? And there is that possibility that you're wrong because you are human, too." (As indicated in note 9 *infra*, Missouri practice recognizes residual doubt as a permissible argument in appropriate cases.)

[7] The aggravating circumstances were: (1) whether the defendant murdered Charles Taylor for the purpose of the defendant receiving money or any other thing of value from Charles Taylor or another person; (2) whether the defendant, as an agent or employee of another person or persons and at their direction, murdered Charles Taylor; (3) whether the murder of Charles Taylor involved depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible or inhuman; and (4) whether Charles Taylor was a potential witness in pending prosecutions of Charles Shurn, and/or Larry Shurn in Federal Court and was killed as a result of his status as a potential witness. Pet. App. A-306. The jury found three of the four, declining to find murder for the purpose of receiving money.

The trial court found that Weaver's evidence supported the submission of the following mitigating circumstances: (1) whether the defendant has no significant history of prior criminal activity; (2) whether the defendant was an accomplice in the murder of Charles Taylor and whether his participation was relatively minor; (3) whether the defendant acted as an accomplice and was not the trigger man; (4) whether the defendant has two young children and has a mother in failing health; (5) whether the defendant has worked with young people in encouraging them to stay out of trouble and avoid drugs; (6) whether the defendant, after his incarceration, has worked with inmates in teaching them reading and language skills, and assists inmates with disabilities; (7) whether the defendant, since his incarceration, has been given responsibilities of trustee, indicating traits of character showing cooperation, helpfulness and a willingness to work within the confines

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of life imprisonment unless it found that (a) at least one of the aggravating circumstances had been proven beyond a reasonable doubt, Pet. App. A-305; (b) the aggravating circumstance(s) were sufficient to warrant the imposition of the death penalty, Pet. App. A-306; and (c) the aggravating circumstances outweighed the mitigating circumstances. Pet. App. A-307-08. It explained that, regardless of how the jurors weighed the aggravating circumstances, the final decision regarding the appropriate punishment was theirs to make. Pet. App. A-309.

The court's only instruction bearing on Westfall's arguments was a generic, unelaborated admonition that the arguments of counsel are not evidence. Pet. App. A-312.

IV. THE EVIDENCE BEFORE THE JURY AT THE TIME OF WESTFALL'S ARGUMENT.

A. The Guilt-Phase Evidence

Weaver was prosecuted on the theory that he and co-indictee, Daryl Shurn, killed Taylor to prevent Taylor from testifying against Shurn's brother in an imminent drug prosecution. Taylor was a drug user who acted as a "straw" purchaser, holding property in his name paid for by the Shurn brothers and used in their drug enterprise. Tr. 1047-48. After Taylor was shot, his two assailants drove away; their car was stopped several minutes later by police, who apprehended its driver, Daryl Shurn, Tr. 741. An officer observed a passenger fleeing into a nearby wooded area. Tr. 745.

The prosecution's case that Weaver was the passenger – and hence the second assailant – had three aspects. First, there was some eyewitness testimony. Individuals who saw the murder recalled that the clothing worn by one of the killers was similar to what Weaver was wearing

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of authority; and (8) any circumstances which you find from the evidence in mitigation of punishment. Pet. App. A-307-08.

at the time he was apprehended;[8] and the officer who arrested Shurn identified Weaver at trial as the passenger who escaped. Tr. 755. Second, there was Weaver's proximity to the crime: he was stopped and arrested by a police officer when he was seen jogging without shoes in a nearby neighborhood. Tr. 806-08. Third, jailhouse informant, Robert "Dutch" Tabler, provided the previously missing connection between Shurn and Weaver through his testimony that Weaver told Tabler that he was a "hit man" for the Shurns, that he shot Taylor, and that he later threw the gun out of the car. Tr. 989.

The Warden asserts that "the State's case for the death penalty was particularly strong." Pet'r. Br. at 27. Because Weaver's trial counsel relied in part upon residual doubt concerning Weaver's guilt, a factor which Missouri juries are permitted to consider as a basis for refraining from a death sentence,[9] it bears note that the state's case at the guilt phase was not at all open and shut. Both on cross-examination and during the defense case-in-chief, Weaver's counsel pointed out deficiencies in the identification evidence.[10] Counsel also elicited evidence that Weaver

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[8] *See, e.g.*, Tr. 645, 665.

[9] In Missouri, in appropriate cases it is standard practice to argue residual doubt as a ground for a sentence less than death. *See, e.g., State v. Clayton*, 995 S.W.2d 468, 478 (Mo. 1999). Weaver's jury was instructed that in determining whether the circumstances warranted imposition of the death penalty and in weighing those circumstances, it was to consider "[a]ll of the evidence relating to the murder of Charles Taylor," Pet. App. A-306-07, and that in determining whether death was the appropriate punishment, the jury was to consider "all the circumstances" of the case. *Id.* at A-309.

[10] Several of the eyewitnesses testified that the man they saw with Daryl Shurn that day wore "darkish red" (Tr. 646), "maroon" (Tr. 665) or "burgundy" clothing. Tr. 665. When Weaver was stopped by the police shortly after Taylor was shot, he was wearing a pink shirt and pink and blue shorts. Tr. 809. Moreover, several witnesses insisted that the man they saw running had on long pants. *See, e.g.*, Tr. 1147; 1150; 1595. And

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made no attempt to run when the officer asked him to stop, and that Weaver gave the officer his correct name and address. Tr. 807. Weaver did not have a weapon (Tr. 789); no gunpowder residue was found on his hands (Tr. 950); and, his fingerprints were not found in Shurn's car. Tr. 957. In addition, the federal prosecutors called by the state to establish the connection between Shurn and Taylor were obliged to admit that Weaver's name never surfaced in their investigation and that they had no evidence he was involved in the drug trade. Tr. 1038. Defense counsel impeached jailhouse informant Tabler as a convicted rapist and methamphetamine user facing eighteen years in prison who had made a deal with the prosecution in Weaver's case to cut his incarceration to approximately fourteen to eighteen months. Tr. 989-90, 996-97, 1000.[11] Weaver presented an explanation for his location and activity at the time of arrest which, though strange, was corroborated.[12] He also called character witnesses to attest to his nonviolent nature and his involvement in anti-drug educational programs. Tr. 1177; 1181; 1189.

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the police officer's identification of Weaver as the man who fled from Shurn's car was originally made in a one person "show up." Tr. 755.

[11] Several inmate witnesses called by the defense testified that Tabler told them he would say or do "anything" to get out from under the pending charges. *See, e.g.*, Tr. 1246; 1259. The inmates also testified that numerous jail prisoners were in and out of Weaver's cell because it was the only one with a window. Tr. 1244. Thus, they testified that Tabler could easily have obtained the information he related to the jury from Weaver's legal papers, which were in plain view in Weaver's cell. *Id.*

[12] Weaver testified that he was near the Mansion Hills complex that morning for an illicit sexual encounter, but when the woman failed to appear, he went jogging. Tr. 1328. Leslie Cunningham confirmed under oath that she was supposed to meet Weaver at her godfather's Mansion Hill residence at 7:00 a.m. but was late. Tr. 1230. She also testified that when she did arrive, she left because she saw police cars and she had no driver's license. *Id.*

B. The Penalty-Phase Evidence.

The state presented no evidence at the sentencing phase of the trial. Tr. 1729. Weaver presented a number of witnesses to establish that he was a person of good character, that he had no significant prior record, and that he would be a positive influence in the prison system, as well as to suggest that his guilt was not a certainty.

Debra Jones testified that Weaver had been "like a father" and an "inspiration" to her son and "others in community." Tr. 1730. Arlene Simpson told the jurors that Weaver had "always tried to influence people . . . to walk a straight line." Tr. 1733. His aunt, Mary Wrice, testified that he was a "very good son" and "very respectful." Tr. 1735-36. A local Lutheran minister, Reverend Schroeder, discussed a number of "very positive experiences" with Weaver in conjunction with programs for neighborhood youth. Tr. 1737. Schroeder also recounted his ongoing involvement with Weaver after Weaver's arrest, and he expressed confidence that Weaver could be a "very positive person in the prison population." *Id.* at 1738. Weaver's father told the jury how Weaver helped look after his ailing mother, and that Weaver was a good father to his two children. Tr. 1742-43. Weaver testified again, reaffirming his innocence but also describing how he had gone back to school, obtained his GED, completed a program at a local business college, and obtained a communications license. Tr. 1744-46. He discussed his work with young people in the community, his work in the county jail infirmary, and his teaching other inmates to read and spell. Tr. 1751-53. He also informed the jurors that he had one prior misdemeanor conviction. Tr. 1754.

V. STATE-COURT DECISION OF WEAVER'S DUE PROCESS CLAIM.

After the jury returned a death verdict,Weaver filed a motion for postconviction relief, which the trial court denied. Weaver then filed a consolidated appeal in the

Missouri Supreme Court.[13] He raised a number of claims,[14] but his primary contention was that Westfall made numerous improper and prejudicial comments during his summations at both phases of the capital trial and that the arguments individually and collectively violated the Eighth and Fourteenth Amendments. J.A. 44-61.

Weaver argued that virtually the entire penalty-phase argument was improper. He contended that Westfall made impermissible comments emphasizing his authority and expertise as the elected prosecuting attorney, which implicitly and explicitly urged the jury to defer to his judgment that death was the appropriate punishment; that Westfall improperly implied that defense counsel had suborned perjury and fabricated evidence; that Westfall improperly argued matters outside the record or not supported by the record; that Westfall improperly urged the jury to impose death regardless of whether Weaver individually deserved it, in order to send a message and protect the community; and that Westfall made comments calculated to arouse the jurors' fears and biases. J.A. 46-61.

The Missouri Supreme Court rejected these arguments. Making no reference to the constitutional bases of Weaver's claims, it evaluated them under the state-law rule that "[t]he trial court has considerable discretion in allowing argument of counsel, and the rulings are reversible only for abuse of discretion where argument is plainly unwarranted." *State v. Weaver*, 912 S.W.2d 499, 512 (Mo.

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[13] At that time, Missouri had a unitary system in which the post-conviction appeal and the direct appeal were heard by the state supreme court in a consolidated proceeding.

[14] For example, Weaver maintained that he was entitled to a new trial because Westfall's investigator, Lawrence Freeman, "posed as a juror, wore a juror button, and mingled with the venire panel" during jury selection. Pet. App. A-230. The state court concluded that "Freeman's conduct was thoughtless, if not bizarre," urged that he be "admonished," but concluded that Weaver had not demonstrated any prejudice. *Id.* at A-231.

1996); Pet. App. A-232.[15] The court addressed only a few of Weaver's specific contentions. Regarding the contention that Westfall improperly emphasized his special authority as the elected prosecutor in asking the jury to accept his judgment that death was the right punishment for Weaver, the court recognized that some of Westfall's rhetorical techniques "may seem flamboyant, if not somewhat abrasive, to a juror's ears." *Id.* Nevertheless, it concluded that they were "for the most part, a fair comment on the strength of the case," and it noted that the trial court had sustained objections to some of the arguments and directed the jury to disregard them. *Id.*[16] Regarding Weaver's challenge to Westfall's attacks on defense counsel, the court dismissed them as "[a]t most, . . . near error which, by definition, is not error." *Id.* at A-236. It then concluded:

> Lastly, Weaver puts forth a collection of allegedly improper arguments made by the state during the punishment phase, including the complaint that the prosecutor argued matters outside the evidence that lacked evidentiary support. The prosecutor argued that had Weaver not run out of bullets he would have shot the arresting officer. He argued that if a prosecution witness had been out jogging a short while after the crime Weaver would also have shot the witness. Finally, he argued that the death penalty would be

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[15] For this proposition, the court cited an earlier Missouri case that in turn cited only state-law precedents and did not address any federal constitutional objection to the prosecutor's argument, *State v. Armbruster*, 641 S.W.2d 763, 766 (Mo. 1982).

[16] Weaver separately alleged that trial counsel's failure to object to some of Westfall's arguments violated his Sixth Amendment right to the effective assistance of counsel. The Missouri Supreme Court rejected that contention because a "review of the record discloses that defense counsel objected vehemently to almost all of the arguments complained of here and several of the objections were sustained followed by curative instructions to the jury." Pet. App. A-232.

> a deterrent. Our review of the penalty phase arguments discloses that these arguments are reasonable. . . . The claim that the trial court abused its discretion in permitting the argument is without merit. The point is denied.

Id. at A-236-37.

VI. FEDERAL COURT PROCEEDINGS.

Weaver filed a petition for habeas corpus in the United States District Court for the Eastern District of Missouri. After initially granting relief on another issue,[17] the district court determined that several of Westfall's individual comments and the penalty-phase argument as a whole violated the Eighth and Fourteenth Amendments, and that the Missouri Supreme Court's approval of the arguments was contrary to and involved an unreasonable application of clearly established federal law. *Weaver v. Bowersox*, No. 4-96-CV-2220 (CAS) (E. D. Mo. May 7, 2003).

A divided panel of the Eighth Circuit affirmed. *Weaver v. Bowersox*, 438 F.3d 832, 842 (8th Cir. 2006); Pet. App. A-2. The majority opinion, written by Judge Melloy, identified this Court's precedents as the source for the governing due process standard: "A prosecutor's argument violates due process if it 'infect[s] the trial with unfairness.'" Pet.

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[17] The district court first concluded that Westfall exercised his peremptory challenges in a racially discriminatory manner in violation of this Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). *Weaver v. Bowersox*, No. 4:96-CV-2220 (CAS) (E. D. Mo. July 1, 1996); Pet. App. A-203. The district court determined that Westfall's purported reason for striking one potential juror ("I was not persuaded she could give the death penalty, particularly to a black person") was "clearly not race neutral and that Weaver has met his overall burden of proving discrimination." *Id.* at A-210. A divided panel of the Eighth Circuit reversed, reasoning that the state court's resolution of Weaver's claim was consistent with "the dual motivation analysis that we have recognized." *Weaver v. Bowersox*, 241 F.3d 1024, 1032 (8th Cir. 2001); Pet. App. A-200.

App. A-12 (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)). It explained that the application of this rule requires attention to the totality of the circumstances, and it summarized the established methodology "[to] determine if a prosecutor's statement infected Weaver's trial with unfairness:"

> [T]he court must: (1) Measure the type of prejudice that arose from the argument; (2) examine what defense counsel did in his [or her] argument to minimize prejudice; (3) review jury instructions to see if the jury was properly instructed; and (4) determine if there is a reasonable probability that the outcome of the sentencing phase would have been different, taking into account all the aggravating and mitigating circumstances.

Id. at A-12.

The majority then identified the following five categories into which the challenged prosecutorial arguments fell:

> (1) an analogy that the role of a juror is like that of a soldier who must do his or her duty and have the courage to kill; (2) statements by the prosecutor about his personal belief in the death penalty; (3) statements that executing Weaver was necessary to sustain a societal effort as part of the "war on drugs"; (4) assertions that the prosecutor had a special position of authority and decided whether to seek the death penalty; and (5) arguments that were designed to appeal to the emotions of the jury (culminating in a statement that the jury should "kill [Weaver] now").

Id. at A-13. It found that the arguments in the first category – that the jurors, like "soldiers" in wartime, had a "duty" to sentence Weaver to death – violated the Eighth Amendment. *Id.* (citing *Newlon*, *supra*, where the Eighth Circuit granted habeas relief on the basis of similar improper arguments by Westfall). The majority found that

the arguments in categories 2, 4, and 5 – Westfall's interjection of his personal judgment that Weaver deserved death, his invocation of his official position of authority to bolster that judgment, and his effort to evoke the jurors' emotional reactions – "are improperly inflammatory under several existing United States Supreme Court precedents." Pet. App. A-14.[18] It found that the third category of arguments, those insisting that Weaver's execution was essential to further society's "war on drugs," violated both the Eighth Amendment, *id.* (citing a half-dozen of this Court's opinions dealing with the prohibition of arbitrariness and with the requirement of individualization in capital sentencing), and the Due Process Clause. *Id.* at A-15 (citing Eighth Circuit decisions which in turn cited this Court's principal cases dealing with due process restrictions on prosecutorial argument).[19]

Finally, having concluded that "[t]here is little doubt that the prosecutor's statements are such that we would certainly grant relief without applying AEDPA," the majority turned to the "closer" question posed by § 2254(d): "[W]hether the state court made an unreasonable interpretation of federal law as required by AEDPA."

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[18] The opinion at this point cites three Eighth Circuit decisions – *Miller v. Lockhart*, 65 F.3d 676, 684-85 (8th Cir. 1995), *Newlon*, 885 F.2d at 1335-37, and *Shurn*, 177 F.3d 667-69 (Wollman, J., concurring). Two of those decisions cited and followed the leading due process precedent from this Court. *Miller* quoted and applied the due process rule of *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974); *Newlon* relied upon both *Donnelly* and *Darden v. Wainwright*, 477 U.S. 168, 179 (1986). *Shurn* and *Newlon* involved very similar arguments made by Westfall.

[19] *Sublett v. Dormire*, 217 F.3d 598 (8th Cir. 2000), relies on *Donnelly* and *Darden*; *Copeland v. Washington*, 232 F.3d 969 (8th Cir. 2000), relies on *Donnelly*, *Darden*, and *Romano v. Oklahoma*, 512 U.S. 1 (1994); *United States v. Johnson*, 968 F.2d 768 (8th Cir. 1992), relies on *Berger v. United States*, 295 U.S. 78, 85 (1935), and *Viereck v. United States*, 318 U.S. 236 (1943).

Id. The sheer magnitude of the impropriety of the prosecutor's arguments dictated the answer:

> The conclusion by the Missouri Supreme Court that "the penalty phase arguments . . . [were] reasonable" is unreasonable under existing United States Supreme Court precedents. It is unclear which precedents the Missouri Supreme Court applied. Regardless, there can be no interpretation of the inflammatory remarks by the prosecutor that is reasonable under the various applicable United States Supreme Court precedents. As a result, AEDPA does not bar relief in the present matter.

Id. at A-15-16.[20]

SUMMARY OF ARGUMENT

The Warden's Brief on the Merits reveals that, for two independent reasons, the writ of certiorari was improvidently granted and should be dismissed. First, the only ground that the Warden urges for reversal is radically at odds with the single question presented in his petition for certiorari. Indeed, the Warden's merits brief openly concedes that the premise of his Question Presented is false.

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[20] Judge Bye agreed with Judge Melloy that "Weaver's claims warrant habeas relief even if AEDPA's strict standard of review applies." 438 F.3d at 842. But he also wrote separately to express his view that § 2254(d) did not apply. While he accepted that a "summary" state court decision can constitute an adjudication on the merits for purposes of § 2254(d), Judge Bye urged that "a distinction must be drawn between summarily disposing of a claim and wholly ignoring it." Pet. App. A-19. Judge Bye explained that "[t]he state court opinion discusses only the first three of the six arguments advanced by Weaver" in claim IV.C. of his state-court brief. *Id.* Judge Bowman concurred in Judge Melloy's finding that § 2254(d) applied to this case, but dissented from the judgment granting Weaver relief. Although he did acknowledge that "[w]ere it not for the AEDPA standard of review, I might agree with the result reached by the Court today." Pet. App. A-21.

Second, although the Eighth Circuit held that some of Westfall's arguments violated the Due Process Clause of the Fourteenth Amendment and that others violated the Cruel and Unusual Punishments Clause of the Eighth Amendment, the Warden's merits brief now makes clear that he is challenging only the former. Thus, any decision this Court could issue would be strictly advisory, and would have no impact on the Eighth Circuit's judgment.

On the merits, the Eighth Circuit's ruling that Westfall's penalty-phase closing arguments violated the due process standard established by *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), and *Darden v. Wainwright*, 477 U.S. 168 (1986), was correct. Considered in their totality and in the context of the record as a whole, Westfall's arguments were riddled with improprieties that offended an array of interests protected by the Due Process Clause. Westfall invoked his authority as elected prosecuting attorney and implied that this gave him special knowledge that Weaver's case was particularly deserving of a death sentence. He told the jurors that their job was not to consider Weaver as an individual but to make Weaver's sentence serve the larger purpose of sending a message to drug-dealing scum and their minions. He told the jurors they were soldiers bound by duty to return a death verdict. He invoked a cinematic General Patton exhorting soldiers that when their buddy's face erupted in a "pile of goo" they would "know what to do," and made other inflammatory appeals to raw emotion. He argued factual matters not supported by the record and made coded allusions to Weaver's race as a factor in favor of death. This performance was not simply outrageous according to every precept concerning prosecutorial arguments that this Court has ever endorsed; it was calculated to subvert the rationality of the capital sentencing process and to produce a death sentence that was the product of pure passion.

Westfall's conduct was all the more egregious because it was premeditated. He had used many of these arguments twice before in capital trials, and he was admittedly aware that they had recently been found unconstitutional by a federal court. His conduct was no inadvertent slip into occasional excesses but implemented a deliberate, unrelieved, persistent strategy to excite the jury's temper and release its judgment from the discipline of facts and law. This argument was not invited by defense counsel's closing remarks nor was it effectively cauterized by them. Although the trial court did instruct the jury that arguments were not evidence and did sustain a handful of defense counsel's objections, neither action stemmed or corrected the torrent of offensive exhortation. Finally, because the prosecution's case for death was not particularly strong on the facts, and because Weaver presented substantial mitigating evidence, there is every reason to believe the jury's verdict was affected by the prosecutor's improper arguments.

The Eighth Circuit was also correct to conclude that the Missouri Supreme Court's decision rejecting Weaver's due process claim involved an unreasonable application of clearly established federal law. This Court's precedents require a reviewing court to examine the totality of the circumstances and to consider a well-defined set of factors bearing upon the due process issue. The state court's opinion shows not only that it omitted critical portions of the record from its analysis, but that it failed to consider any of the factors this Court's decisions have identified as important. Had the state court applied this Court's decisions – or even a reasonable facsimile of the analytic process this Court's decisions illustrate – it could not reasonably have escaped the conclusion that Weaver's due process rights were violated on this record.

ARGUMENT

I. FOR TWO DISTINCT REASONS, CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

A. The Only Ground for Reversal Now Advanced by the Warden is Outside and Irreconcilable with the Question Presented.

The petition for certiorari in this case presented a single question:

> Since this court has neither held a prosecutor's penalty phase closing argument to violate due process, nor articulated, in response to a penalty phase claim, what the standard of error and prejudice would be, does a court of appeals exceed its authority under 28 U.S.C. § 2254(d)(1) by overturning a capital sentence on the ground that the prosecutor's penalty phase closing argument was "unfairly inflammatory?"

Pet. at i. The explicit premise of the question was that this Court's precedents addressing due process challenges to prosecutorial closing arguments at the guilt-or-innocence phase of a trial do not establish a rule of decision applicable to the penalty phase of a capital case. *See id.* at 8 ("No Supreme Court authority addresses the constitutionality of the prosecutor's penalty phase closing argument like the one presented by the prosecutor in the present case."). The petition's question thus asked whether – in the absence of any relevant "clearly established Federal law, as determined by the Supreme Court of the United States" (28 U.S.C. § 2254(d)(1)) – the Eighth Circuit erred in overturning a Missouri Supreme Court decision finding no due process violation in a prosecutor's penalty-phase closing argument. And the petition's answer was framed in those terms: "The panel dissent properly concluded that the state court's resolution of the penalty phase argument is reasonable given the lack of clearly established Supreme Court precedent." *Id.* at 13.

The Warden has now abandoned that argument. Instead, his brief on the merits affirmatively embraces the very proposition denied in the question presented and the body of the petition: that there *are* precedents from this Court providing "clearly established federal law" governing Weaver's due process claim. As the Warden now puts it, "[t]he 'clearly established Federal law' applicable to [Respondent's] ... claim is set forth in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), *Darden v. Wainwright*, 477 U.S. 168 (1986), and *Romano v. Oklahoma*, 512 U.S. 1 (1994)." Pet'r. Br. at 20; *see id.* at 20-22. The Warden's argument now is merely that, on the particular facts of this case, the court of appeals misapplied this Court's concededly governing precedents. *See, e.g., id.* at 23 (arguing that on the facts the Missouri Supreme Court's decision "is wholly consistent with *Donnelly*, *Darden*, and *Romano*"). Having won a grant of certiorari by purporting to present a broad question of national significance, the Warden's brief on the merits submits nothing more than a request to review a fact-bound decision of a lower court.

Such bait-and-switch tactics are directly contrary to this Court's rules. Specifically, Supreme Court Rule 14.1(a) instructs that on certiorari, "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." This Rule codifies the well-established principle that "[o]ne having obtained a writ of certiorari to review specified questions is not entitled here to obtain decision on any other issue." *Gen. Talking Pictures Corp. v. W. Elec. Co.*, 304 U.S. 175, 179 (1938). *See, e.g., Norfolk So. Ry. Co. v. Sorrell*, 127 S. Ct. 799, 804-05 (2007) ("We are typically reluctant to permit parties to smuggle additional questions into a case before us after the grant of certiorari"); *Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 140 (1998) (refusing to allow petitioners to raise arguments outside the questions presented in the petition); *Okla. Tax Comm. v. Chickasaw Nation*, 515 U.S. 450, 457 (1995) (stating that the Court will only entertain issues withheld until merits briefing "in the most exceptional circumstances");

Chandris, Inc. v. Latsis, 515 U.S. 347, 353 (1995) (declining to consider an argument made for the first time in the opening brief); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 30-31 (1994) (per curiam) (dismissing the writ as improvidently granted because the Court could not reach the merits of the case without considering issues not raised in the petition); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992) (declining to consider an argument not made in the petition); *Yee v. Escondido*, 503 U.S. 519, 535 (1992) (stating that the Court will disregard Rule 14.1(a) "only in the most exceptional cases"); *American Nat'l Trust Co. of Chicago v. Haroco, Inc.*, 473 U.S. 606, 608 (1985) (per curiam) (refusing to consider a question not presented in the petition for certiorari); *Irvine v. California*, 347 U.S. 128, 129 (1954) (opinion of Jackson, J.) ("We disapprove the practice of smuggling additional questions into a case after we grant certiorari").

As this Court has explained, Rule 14.1(a) "serves two important and related purposes." *Yee*, 503 U.S. at 535. By insisting that the petition's questions presented fairly define the issues to be argued, it helps the Court to select for plenary review only those cases that truly present apt vehicles for review of important federal questions. *Id.* at 536. And when a petition does not present a case of that sort, the Rule assures the respondent of an opportunity to "sharpen the arguments as to why certiorari should not be granted." *Id.*; *see also Taylor*, 503 U.S. at 646 ("The Court decides which questions to consider through well-established procedures; allowing the able counsel who argue before us to alter these questions or to devise additional questions at the last minute would thwart this system"). The Warden has frustrated both of those purposes here. After misleading both the Court and Respondent about his intended argument at the certiorari stage, the Warden now seeks to foist upon the Court a purely fact-bound, record-specific question of no general consequence. The Court should not tolerate such a subterfuge. It should dismiss the writ as improvidently granted.

B. The Decision of the Court of Appeals Rests on Two Independent Grounds, and the Warden Has Challenged Only One of Them.

The judgment of the court of appeals rests on two independent grounds. The court concluded that some of the prosecutor's statements during his penalty-phase closing argument violated the Due Process Clause of the Fourteenth Amendment and that others violated the Cruel and Unusual Punishment Clause of the Eighth Amendment.[21] The two categories of statements the court found to violate the Eighth Amendment were the statement "that the role of a juror is like that of a soldier who must do his or her duty and have the courage to kill," and "statements that executing [Respondent] was necessary to sustain a societal effort as part of the 'war on drugs.'" Pet. App. A-13-14.[22] Those Eighth Amendment holdings are

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[21] Of course, the Eighth Amendment applies to the States by virtue of its incorporation into the Fourteenth Amendment's Due Process Clause. But the substance of Eighth Amendment rules and due process rules remain distinct, and we follow the Court's convention of referring to claims invoking those rules as Eighth Amendment claims and due process claims respectively. Later in this brief we will note that, under the Court's cases, a due process analysis may include some consideration of whether the prosecutor's statements "implicate[d] other specific [constitutional] rights." *Darden*, 477 U.S. at 182. In this case, the other rights implicated by the prosecutor's statements included rights under the Eighth Amendment. But the due process analysis cannot require a showing that the statements in question separately violated – as opposed to "implicating" – some other provision. If it did, the due process analysis would be superfluous. And in this case, the court of appeals went far beyond suggesting that the prosecutor's statements raised Eighth Amendment concerns. It explicitly held that two of the five categories of prosecutorial statements violated the Eighth Amendment – a holding that constituted a separate and independent ground for relief.

[22] As to Westfall's analogy between soldiers and jurors, the court concluded:

> Describing jurors as soldiers with a duty eviscerates the concept of discretion afforded to a jury as required by the

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independent of the court's conclusion that three other sets of prosecutorial arguments violated due process. *See id.* at 13-15.

At the petition phase, it was not entirely clear whether the Warden intended to challenge both grounds of the court of appeals' decision or only the due process ground. The question presented referred only to due process, *see* Pet. at i, but the "Constitutional and Statutory Provisions Involved" listed both the Due Process Clause and the Eighth Amendment, *id.* at 1. The Warden's brief on the merits, however, makes it abundantly clear that the petition was not intended to contest the lower court's Eighth Amendment ruling. Like the petition, the merits brief's recitation of the question presented continues to focus only on due process. *See* Pet'r Br. i. But unlike the petition, the brief's list of "Constitutional and Statutory Provisions Involved" now omits any mention of the Eighth Amendment. *Id.* at 2. And the Warden's actual argument is based entirely on due process. *See, e.g., id.* at 20, 22, 23, 28 (identifying the Court's due process precedents in *Donnelly*, *Darden*, and *Romano* as establishing the relevant clearly established law, arguing that the Missouri Supreme Court's decision was not contrary to or an unreasonable application of those precedents, and contending that the court of appeals erred in concluding to the

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Eighth Amendment. *See Zant v. Stephens*, 462 U.S. 862, 879 (1983). Not only was the main thrust of the prosecutor's argument diametrically opposed to the requirement that capital sentencing be at the jury's discretion, it also "diminished the jury's sense of responsibility for imposing the death sentence, in violation of the Eighth Amendment under *Caldwell v. Mississippi*, 472 U.S. 320, 86 L. Ed. 2d 231, 105 S. Ct. 2633 (1985)."

Pet. App. A-13. As to the prosecutor's exhortation to execute Weaver as part of the larger "war on drugs," the court observed that "[t]he controlling Supreme Court precedent is well-settled and longstanding: The Eighth Amendment requires capital sentencing to be an individualized decision-making process." *Id.* at A-14.

contrary). Nowhere does the Warden argue that the Eighth Amendment ground of the court of appeals' decision was wrong either as a matter of this Court's Eighth Amendment precedents or under the restrictions imposed by 28 U.S.C. § 2254(d)(1).[23]

Consequently, nothing the Court says about the due process issue can disturb the judgment of the court of appeals. This Court does "not reach for constitutional questions not raised by the parties." *Mazer v. Stein*, 347 U.S. 201, 206 n.5 (1954). Its appropriate refusal to address the Eighth Amendment issue in this case will render anything it says about the due process issue wholly advisory. In such circumstances, the appropriate course is to dismiss the writ as improvidently granted. *See Izumi Seimitsu*, 510 U.S. at 34 (dismissing where petitioner appealed only the grant of a vacatur motion and not the denial of a motion to intervene, when each ruling was sufficient to support the judgment below); *see also Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109-11 (2001) (dismissing where resolution of the question presented would require a threshold inquiry into issues decided by the court of appeals but not presented in the petition for certiorari); *and see Flournoy v. Wiener*, 321

[23] Although he does not challenge the Eighth Amendment holding below, the Warden does acknowledge it. By the Warden's own account, the court of appeals found two of the five categories of prosecutorial statements in issue to violate the Eighth Amendment, not the Due Process Clause. *See* Pet'r. Br. at 15-16 (summarizing the court's treatment of "category (1)" and "category (3)"). Moreover, the Warden openly concedes the distinctness of the due process and Eighth Amendment issues in the case. *See id.* at 28-29 ("[W]hen the court of appeals did refer to this Court's cases, it frequently referred to cases that did not address due process claims like Weaver's, but Eighth Amendment precedent not directly on point."). The Warden is right that the Eighth Amendment cases relied upon by the Court of Appeals do not address the due process component of Weaver's claims. Instead, they establish an entirely separate ground of relief sufficient to support the judgment below. The Warden leaves that separate ground untouched.

U.S. 253, 261-62 (1944) (dismissing where it was "apparent that the decision of the single question arising under the Fifth Amendment, cannot, in the present state of the record, be dispositive of the case" and an "opinion on the subject would be advisory only"); *cf. Belcher v. Stengel*, 429 U.S. 118, 119-20 (1976) (dismissing the writ as improvidently granted, "[n]ow that plenary consideration has shed more light on this case than in the nature of things was afforded at the time the petition for certiorari was considered").

II. THE CLEARLY ESTABLISHED ELEMENTS OF DUE PROCESS IN PROSECUTORIAL CLOSING ARGUMENT.

With respect to claims that state courts have adjudicated on the merits, AEDPA provides that a federal habeas court shall not grant relief unless the state decision "was contrary to or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Clearly established Federal law excludes "open questions[s] in [this Court's] jurisprudence," *Carey v. Musladin*, 127 S.Ct. 649, 652 (2006), and is limited to "'the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.'" *Yarborough v. Alvarado*, 541 U.S. 652, 660-61 (2004) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003)). As the Warden now concedes, Weaver's claim is governed by the clearly established federal law set forth in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), *Darden v. Wainwright*, 477 U.S. 168 (1986), and *Romano v. Oklahoma*, 512 U.S. 1 (1994). Pet'r. Br. at 20.[24]

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[24] This concession may reflect a belated recognition of the consensus among the federal courts of appeals and state courts that *Darden* supplies the rule governing claims of prosecutorial misconduct in penalty-phase argument. *See Bates v. Bell*, 402 F.3d 635, 640-41 (6th

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A. The Due Process Standard.

As *Donnelly* first articulated in the context of a non-capital case, improper prosecutorial closing arguments may "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." 416 U.S. at 643. *Darden* applied this rule to evaluate the constitutionality of a guilt-phase argument in a capital case. 477 U.S. at 181. And *Romano*, though specifically concerned with a prosecutor's presentation of evidence rather than closing argument, confirmed that *Donnelly* and *Darden* provided the "proper analytic framework" for due process claims based upon potentially prejudicial prosecutorial conduct during the sentencing phase of a capital trial. 512 U.S. at 12.

Cir. 2005); *Smith v. Mitchell*, 348 F.3d 177, 210-11 (6th Cir. 2003); *Bell v. Evatt*, 72 F.3d 421, 436 (4th Cir. 1995); *Nichols v. Scott*, 69 F.3d 1255, 1278 (5th Cir. 1995); *Siripongs v. Calderon*, 35 F.3d 1308, 1319 (9th Cir. 1994); *Kennedy v. Dugger*, 933 F.2d 905, 914 (11th Cir. 1991); *Lesko v. Lehman*, 925 F.2d 1527, 1540-41, 1546 (3d Cir. 1991); *Williams v. Chrans*, 945 F.2d 926, 947 (7th Cir. 1991); *Blair v. Armontrout*, 916 F.2d 1310, 1322-24 (8th Cir. 1990); *Gaskins v. McKellar*, 916 F.2d 941, 951 (4th Cir. 1990); *Smith v. Black*, 904 F.2d 950, 972 (5th Cir. 1990); *Hayes v. Lockhart*, 852 F.2d 339, 346-47 (8th Cir. 1988); *Robison v. Maynard*, 829 F.2d 1501, 1509 (10th Cir. 1987); *Williams v. Kemp*, 846 F.2d 1276, 1282-83 (11th Cir. 1988); *Henderson v. State*, 583 So.2d 276, 304 (Ala. 1990); *State v. Walden*, 905 P.2d 974, 1001 (Ariz. 1995); *People v. Miranda*, 744 P.2d 1127, 1161 (Cal. 1987); *State v. Reynolds*, 836 A.2d 224, 334 (Conn. 2003); *State v. Lawrie*, No. IK92-08-0180, 1995 WL 818511, *11 (Del. Nov. 28, 1995); *People v. Spreitzer*, 525 N.E.2d 30, 44 (Ill. 1988); *Templeman v. Commonwealth*, 785 S.W.2d 259, 261 (Ky. 1990); *Evans v. State*, 637 A.2d 117, 126 (Md. 1994); *Pickney v. State*, 538 So.2d 329, 341 (Miss. 1988); *State v. Ramsey*, 864 S.W.2d 320, 332 (Mo. 1993); *Bennett v. State*, 901 P.2d 676, 680 (Nev. 1995); *State v. Koedatich*, 548 A.2d 939, 998 (N.J. 1988); *State v. Compton*, 716 P.2d 837 (N.M. 1986); *State v. Rose*, 451 S.E.2d 211, 229 (N.C. 1994); *State v. Hill*, 661 N.E.2d 1068, 1077 (Ohio 1996); *Stouffer v. State*, 738 P.2d 1349, 1358 (Okla.Crim. App. 1987); *State v. Compton*, 39 P.3d 833, 845 (Or. 2002); *State v. Bell*, 393 S.E.2d 364, 372-73 (S.C. 1990); *State v. Irick*, 762 S.W.2d 121, 130 (Tenn. 1988).

This Court's precedents make clear that the only difference between the standard governing guilt-phase due process claims and sentencing-phase due process claims derives from the different purposes of each proceeding: due process violations in the guilt phase are measured by their effect on the "resulting conviction," *Darden*, 477 U.S. at 181, while due process violations in the sentencing phase are measured by their effect on "the jury's imposition of the death penalty . . . " *Romano*, 512 U.S. at 12-13.

B. Components of the Due Process Calculus.

To determine whether a prosecutor's remarks so infected a proceeding with unfairness as to make the jury's verdict a violation of due process, "examination of the entire proceedings is necessary." *Donnelly*, 416 U.S. at 643; *see also Darden*, 477 U.S. at 179 (remarks must be placed "in context"). The Warden's brief provides a selective rendition of this Court's precedents that does not reflect their requirement of review of the "entire proceedings." He culls from *Donnelly*, *Darden* and *Romano* a subset of the factors that those decisions deemed relevant, producing a rather odd lot, and then paraphrases the selected factors in ways that obscure their import for this case.

Read in their entirety, this Court's cases establish that "entire proceedings" review compels consideration of four distinct sets of factors, each of which has an obvious connection to the underlying touchstone of the analysis – the fundamental fairness of the proceeding. These factors are: (1) the prosecutor's argument; (2) relevant conduct by defense counsel; (3) relevant instructions by the trial court; and (4) the strength of the evidence presented to the jury. *See Donnelly*, 416 U.S. at 645 ("a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge"). Taken together, *Darden* and *Donnelly* provide both examples and general instructions concerning what is

relevant in each category; at some points, *Romano* adds further elaboration. We set out below, in this Court's language, what the Court has said matters in assessing whether unfairness infected a proceeding.

1. The Prosecutor's Argument.

The Court has made clear that within the universe of improper arguments, some are more likely to infect a proceeding with unfairness than are others. One focus of concern is whether "the prosecutor's remarks so prejudiced a specific right as to amount to a denial of that right." *Donnelly*, 416 U.S. at 643. In a parallel vein, the Court has warned against prosecutorial misconduct that "implicate[s] other specific [constitutional] rights of the accused." *Darden*, 477 U.S. at 182; *and see Donnelly*, 416 U.S. at 643 (noting that when specific guarantees are involved, this Court "has taken special care to assure that the prosecutorial conduct in no way impermissibly infringes on them").

A comment's level of "ambigu[ity]" is also relevant. *Donnelly*, 416 U.S. at 645. When the impropriety of a comment depends upon speculation as to whether jurors would "attach this particular [impermissible] meaning to it," *id.* at 644, an adverse effect on the fairness of the proceeding is less likely. This is particularly so when a "plethora of less damaging interpretations" exists. *Id.* at 647. On the other hand, when a prosecutor's comments or pieces of evidence are not susceptible to alternative implications, their potential for prejudice is not allayed by an "equally plausible" possibility that they could cut against a death sentence. *Romano*, 512 U.S. at 13-14.

Intentionality and forethought matter. Quite commonly, arguments are not "carefully constructed in toto before the event." *Donnelly*, 416 U.S. at 646. Consequently, "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning." *Id.* at 647 "[I]mprovisation frequently results in syntax left imperfect and meaning less than crystal clear."

Id. Conversely, evidence that the offensive statements were made intentionally, as part of a concerted plan to produce prejudicial effects, makes it more likely that those statements swayed the jury.

In addition, frequency and repetition matter. Jurors are less likely to be improperly influenced by "isolated passages" than by repeated remarks or themes. *Id.* at 646. The length of remarks is relevant for the same reason. *Id.* at 647 (noting that impropriety, if any, was limited to "a few brief sentences"). Thus, remarks that are both extended and repeated are especially likely to produce fundamental unfairness.

Finally, whether the jury is "affirmatively misled" is of some importance. *Cf. Romano*, 512 U.S. at 9. A jury may be misled "regarding its role in the sentencing process," *id.* at 9, or it may be misled when the prosecutor "manipulate[s] or misstate[s] the evidence." *Darden*, 477 U.S. at 182.

2. Defense Counsel's Closing Argument.

As *Darden* emphasizes, the prosecutor's remarks must be placed in context. *Darden*, 477 U.S. at 179. One aspect of that context is whether "the objectionable content was invited by or responsive to the opening summation of the defense." *Id.* at 182; *see also id.* at 179 ("The prosecutor's comments must be evaluated in light of the defense argument that preceded it . . . "). Likewise, comments by defense counsel that follow the prosecutor's misconduct can ameliorate the effects of improper remarks. Where defense counsel can "turn[] much of the prosecutors' closing arguments against them by placing many of the prosecutors' comments and actions in a light that was more likely to engender strong disapproval than result in inflamed passions against [the defendant]," it is less likely that the proceeding will be infected with unfairness than when counsel cannot or does not do so. *Id.* at 182.

3. The Trial Court's Instructions.

A general instruction that the arguments of counsel are not evidence is "customary," and may be helpful. *Donnelly*, 416 U.S. at 644. More significant is judicial attention to an improper remark in the form of "specific, disapproving instruction." *Id.* at 645. In *Donnelly*, the Court stressed that "the judge directed the jury's attention to the remark particularly challenged here, declared it to be unsupported, and admonished the jury to ignore it." *Id.* Absent such corrective instructions, the jury is less likely to disregard the prosecutor's remark.

4. The Strength of the Evidence.

Finally, assessing whether a proceeding was so infected with unfairness as to deny due process depends upon the "weight of the evidence" on the question to be decided by the jury. Strong evidence "reduce[s] the likelihood that the jury's decision was influenced by argument." *Darden*, 477 U.S. at 180. However, when considering the effect of improper arguments at the sentencing phase of a capital trial, courts must be mindful that the broad discretion inherent in the task of capital sentencing makes the penalty phase decision particularly vulnerable to improper influence. *Turner v. Murray*, 476 U.S. 28, 37 (1986) (reversing a death sentence but not the conviction where the trial court refused to question prospective jurors concerning racial bias); *Satterwhite v. Texas*, 486 U.S. 249 (1988) ("the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer").

The sum of this Court's precedents, then, is that lower courts evaluating a due process claim of prosecutorial misconduct in closing argument must focus on whether the improper arguments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly*, 416 U.S. at 643. To answer that question, a

court must consider the "entire record," including the challenged comments, their potential for prejudice and the prosecutor's manifest intention in making them, whether they were invited or offset by defense counsel's arguments, any ameliorative instructions by the court, and the strength or weakness of the case for death.

III. WESTFALL'S ARGUMENT INFECTED THE SENTENCING PHASE OF WEAVER'S TRIAL WITH FUNDAMENTAL UNFAIRNESS.

Applying this Court's approved mode of constitutional analysis to Westfall's sentencing-phase summation demonstrates why his argument rendered the proceeding fundamentally unfair.

1. The Prosecutor's Argument.

First, Westfall's comments were not isolated or ambiguous. *See Donnelley*, 416 U.S. at 646. He emphasized his position as the elected district attorney and made assertions in that capacity which suggested that the jurors should defer to his expertise in evaluating the gravity of Weaver's crime relative to other murders;[25] he expressed

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[25] *See, e.g.*, Pet. App. A-276 ("I know what my responsibilities are and I know what the right punishment is in this case. So if I'm wasting my time, I choose to waste it anyway in an effort to persuade you to do what's right because the death penalty is what's right here"); *Id.* at A-297 ("I'm the Prosecuting Attorney in this county. I decide in which cases we ask for the death penalty and in which cases we don't"). In *United States v. Young*, 470 U.S. 1, 17-18 (1985), the Court noted that it was improper for the prosecutor to make this type of argument because "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." That danger is greater in a capital-sentencing process that "confine[s] the imposition of the death penalty to a narrow category of the most serious crimes," *Atkins v. Virginia*, 536 U.S. 304, 319 (2002), because a jury urged to trust the prosecutor's experienced, authoritative judgment regarding the comparative gravity of the crime at bar and others that are beyond the

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his own judgment that the death sentence was the only appropriate punishment;[26] he told the jurors that this case was "bigger" than William Weaver and that, rather than focusing on the punishment that Weaver himself deserved,[27] the jury should "send a message" to drug dealers by delivering a death sentence;[28] he made emotional appeals to the jurors to have courage[29] and insisted that

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jurors' knowledge is particularly likely to accept the prosecutor's judgment.

[26] *See, e.g.*, Pet. App. A-279 ("Well if this isn't it, what would it be. If this isn't a case where you can impose a death penalty, . . . then what case would you ever return it in. So if you were being honest with me . . . , then this has to be the case"); *id.* at A-298 ("If these facts don't justify, don't cry out for the death penalty, then what facts justify it"). The District Court concluded that this was an improper attempt to intimidate the jury into voting for the death penalty. *Id.* at A-52-53.

[27] *See, e.g.*, Pet. App. A-276-77 ("This is bigger than William Weaver. . . . It's bigger than all of us;" "You've got to look beyond William Weaver. This isn't personal. This is business"); *id.* at A-293-94 ("The one thing you've got to get through your head, this is far more important than William Weaver. This touches all the dope peddlers and the murderers in the world").

[28] *See, e.g.*, Pet. App. A-277 ("You people represent the entire community. You represent society. You have to send a message here"); *id.* at A-292 ("I'm going to beg you for the entire community and for society not to spare his life. I'm going to beg you for the right message instead of the wrong message. . . . Life in prison? That's the message you want to send to the scum of the world"). The ABA Standard for Criminal Justice 15-3.4(d) (3rd ed. 1993), cmt. on "Improper Matters" states that a prosecutor should not make "[e]motional appeals to jurors for . . . vengeance, to create fear for their personal safety, [or] to make an example of the defendant . . . ". In *United States v. Young*, this Court acknowledged that the Criminal Justice Standards were "useful guidelines" for evaluating the propriety of prosecutorial argument. 470 U.S. at 8.

[29] *See, e.g.*, Pet. App. A-283 ("You've got to reach down [a reference to General Patton's exhortation about soldiers putting their hands into the "pile of goo" that was their buddy's face] and do what you know is right"); A-285 ("I hope you're going to do it. I hope you've got the guts to do it"). In *United States v. Young*, this Court concluded that it was improper for a prosecutor to exhort the jury to "do its job," reasoning

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there was no point in having the death penalty if they did not impose it in Weaver's case;[30] he analogized the jurors' duties to those of soldiers on a battlefield[31] and said it was right to "kill him now;"[32] he argued matters not supported by the record[33] and made thinly veiled racial allusions.[34]

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that "that kind of pressure . . . has no place in the administration of justice." 470 U.S. at 17.

[30] Pet. App. A-294 ("And quite frankly, if you don't sentence him to death in this case, there's no point in having a death penalty"). ABA Standard 5-3.4(d), cmt. on "Improper Matters" states that prosecutors should not make arguments about the consequences of a particular outcome.

[31] *See, e.g.*, Pet. App. A-277 ("Sometimes killing is not only fair and justified, it's right. Sometimes it is your duty"); *id.* at A-298 ("George Patton was talking to his troops because the next day they were going out in battle. . . . And he was going to try and encourage them that sometimes you've got to kill and sometimes you've got ro risk death because it's right"). In *Viereck v. United States*, 318 U.S. 236 (1943), this Court held that prosecutorial argument including statements that "[t]his is a war;" "[w]e are at war;" "[y]ou have a duty to perform here;" "[a]s a representative of your Government I am calling upon every one of you to do your duty," were so offensive that they mandated a new trial despite defense counsel's failure to object. In this Court's view, the trial judge should have *sua sponte* put an end to the entire line of argument. *Id.* at A-242.

[32] Pet. App. A-277. The District Court found this line of argument highly improper. *Id.* at A-68.

[33] *See, e.g.*, Pet. App. A-280 ("Then I'm going to to tell you he was out of bullets, because if he hadn't been, Officer Cram would have been dead. . . . If he still had the gun and still had bullets, do you think he would have surrendered. . . ."). *Compare Darden*, 477 U.S. at 181 (finding that an argument did not render the proceedings fundamentally unfair because the prosecutor did not manipulate or misstate the evidence). The District Court found that Westfall's statement here was not a fair inference from the record and was intended to play on the jurors' fears. Pet. App. A-56.

[34] Pet. App. A-282-83 ("There are times, jurors, when you have to be hard in this life. You have to be harder than the bad guys. Because if they are harder than us, then all the rules disappear and the jungle prevails and the animals reign in the jungle and we can't have that, not if we want to live in a civilized society. . . .").

Many of Westfall's improper comments were fundamentally at odds with this Court's decisions regarding the elements of a constitutionally permissible capital sentencing procedure and undermined those elements. For example, Westfall's repeated assertions that the jury's decision was "bigger than" and "not about" William Weaver cannot be reconciled with this Court's capital punishment jurisprudence recognizing that the jury's role at the sentencing phase is to make an "individualized assessment of the appropriateness of the death penalty." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring); *see also Penry v. Lynaugh*, 492 U.S. 302, 304 (1989) ("punishment should be directly related to the personal culpability of the defendant"); *Eddings v. Oklahoma*, 455 U.S. 104, 105 (1982); *Lockett v. Ohio*, 438 U.S. 586, 606 (1978). Westfall also urged the jury to defer to his decision to seek death in the case on the ground that he was the elected prosecuting attorney and "top" law enforcement officer in the county. Pet. App. A-297. These comments are inconsistent with this Court's mandate in *Caldwell v. Mississippi*, *supra*, that the "jury cannot be led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."[35] 472 U.S. at 328-29. Finally, the racially tinged parts of Westfall's argument, *i.e.*, his insistence that if the jury did not sentence Weaver, who is black, to death then the "animals" would "reign in the jungle" implicated Weaver's equal protection and due process rights.

These numerous improper arguments were no mere slips of the tongue made in the heat of trial. *See United States v. Young*, 470 U.S. at 10 (noting that sometimes improper comments do not warrant reversal because they

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[35] Additionally, Westfall's comments analogizing the jurors' role to that of soldiers in combat who have a duty and responsibility to kill are inconsistent with this Court's decisions (and Missouri law) holding that the death penalty is never mandatory. *See Woodson v. North Carolina*, 420 U.S. 280, 301 (1976).

can be made "off the cuff"); *see also Dunlop v. United States*, 165 U.S. 486, 498 (1897). As previously noted, Westfall's argument in Weaver's case was unquestionably "scripted;" it was in most respects a recycled version of his penalty-phase summations in *Newlon* and *Shurn*. This fact, never mentioned in the Warden's brief, undermines the assertion that Westfall did not intend his comments to have their most damaging effect. Pet'r. Br. at 27.[36] In this connection, it bears repeating that at the time Westfall gave this argument, he knew that many of the same comments had been found unconstitutional by a federal court.

2. Defense Counsel's Closing Argument.

Defense counsel did not invite Westfall's comments by anything done in her sentencing presentation or argument, nor did she effectively rebut them. Westfall went first in closing, and his initial summation contained numerous improper remarks. Defense counsel's subsequent penalty-phase closing, for the most part, stuck to the evidence and argued for life based on Weaver's good character, his adaptability to confinement, and the inconclusiveness of the evidence of guilt. While defense counsel did attempt to counter at least one of Westfall's themes (that the jury should sentence Weaver to death to "send a message" to other "scum") by arguing that a sentence of life without parole would also send a message (Pet. App. A-292), this only led Westfall to make even more outrageous statements in his rebuttal argument.[37] And, since Westfall

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[36] In *Donnelly*, where this Court gave the prosecutor the benefit of the doubt as to his intent, it noted that arguments are "seldom carefully constructed . . . before the event." 416 U.S. at 646-47. Westfall's were.

[37] The Warden implies that some of the remarks in Westfall's final summation were in response to Weaver's counsel's argument that a life sentence would also send a message. Pet'r. Br. at 26. This reasoning is perverse. It cannot be the case that when defense counsel seeks to undo some of the damage done by a prosecutor's initial summation, a prosecutor can respond with even more improper comments in rebuttal.

made the final argument – repeating improper comments or injecting new ones – defense counsel had no opportunity to diffuse the prejudice created by that final summation.[38]

3. The Trial Court's Instructions.

The trial court's instructions were inadequate to correct the prejudice caused by Westfall's arguments. The court did instruct the jury that arguments were not evidence (Pet. App. A-312), but that brief, general instruction, given by every trial judge in every case, could not possibly cure the harm caused by Westfall's relentless, gimleted, graphic, and wholly improper statements.[39] It is true that the trial court sustained a few of defense counsel's objections and instructed the jury to disregard some comments. *See, e.g.,* Pet. App. A-294. While that is relevant, it is not decisive:[40] a handful of sustained objections cannot defeat Weaver's claim, given that defense counsel's objections to many other improper remarks were overruled, *see, e.g.,* Pet. App. A-277, A-80, A-281, A-282, A-296, A-297, A-299, and that still other improprieties by Westfall were not objected to.[41] When one reviews the transcript of

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[38] To the extent defense counsel did have an opportunity to respond to assertions made in the initial argument, the "response" about what "message" the jury would be sending to the community may have actually exacerbated the problem by putting the jury further off the job it was supposed to be doing, *i.e.*, thinking about appropriate punishment for Weaver the individual, not about the most appropriate message to drug scum.

[39] Furthermore, the court's instruction did not address the faults inherent in some of Westfall's most egregious statements, including his exhortation to "send a message," his analogy to jurors as soldiers in a war, or his statement that there was "no point" in having a death penalty if the jury did not sentence Weaver to die.

[40] *See Berger v. United States*, 295 U.S. 78, 85 (1935) (awarding a new trial because of the prosecutor's improper comments and finding that, in light of his pervasive misconduct, they were not corrected by the judge sustaining objections and admonishing the jury not to consider the comments).

[41] The Warden notes on several occasions that trial counsel failed to object to some of Westfall's improper statements. *See, e.g.,* Pet'r. Br.

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the whole argument, it is manifest that even the sustained objections did not stop the onslaught of improper remarks; they were mere bumps in the road.

4. The Strength of the Evidence.

Finally, contrary to the Warden's assertion, this was not a strong case for death. The prosecution presented no evidence in aggravation of punishment at the sentencing phase; Weaver's evidence in mitigation included (a) his lack of prior felony convictions, (b) his good and non-violent character; (c) his work with a variety of school and church youth programs; and (d) his capacity to adapt productively to imprisonment. There were several other obstacles to the prosecution's efforts to convince the jurors to impose death. The evidence of Weaver's guilt was circumstantial, and the prosecution's most damaging evidence came from that most unreliable of witnesses, a jailhouse "snitch." The homicide victim was not blameless. He was a drug user involved in the drug trade; and under the prosecution's theory of the case, this involvement gave rise to the motive for his death. The difficulty in securing a death sentence based on the evidence may well have been the reason Westfall chose to throw caution to the wind and engage in a *Newlon* replay[42] – deciding once again to "let it

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at 6, 7. On direct appeal, the Missouri Supreme Court found that most of the improper comments were objected to; it rejected Weaver's complementary claim of ineffective assistance of counsel based on the failure to object. Pet. App. A-232. Furthermore, this Court has noted that "interruptions of arguments, either by an opposing counsel or the presiding judge, are matters to be approached cautiously." *United States v. Young*, 470 U.S. at 13. The Court has also noted that, regardless whether there was an objection, the trial judge has a responsibility to intervene in some instances. *Viereck*, 318 U.S. at 248.

[42] Westfall seemed to recognize that it was an uphill battle. *See, e.g.*, Pet. App. A-276 ("Maybe this is an exercise in futility. Maybe I'm wasting my time in even talking to you about death because your minds

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all hang out."[43] When his numerous improper arguments are evaluated in light of the entire proceedings, including the problems in the prosecution's case for guilt and death, it is clear that Weaver's sentencing was rendered fundamentally unfair.

IV. THE MISSOURI SUPREME COURT'S DECISION INVOLVED AN UNREASONABLE APPLICATION OF THIS COURT'S PRECEDENTS.[44]

A. The "Unreasonable Application" Inquiry as Demonstrated by this Court.

In *Williams v. Taylor*, 529 U.S. 362, 407 (2000), the Court established that "a state-court decision involves an unreasonable application of this Court's precedent [within

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are made up. I know there has been a lot of crying going on. But I know what my responsibilities are and I know what the right punishment is in this case. So if I'm wasting my time, I choose to waste it anyway in an effort to persuade you to do what's right because the death penalty is what's right here").

[43] In *Newlon*, the district court observed that Westfall's statement to co-workers the night before he gave the closing argument that he was going to "let it all hang out," proved to be true. *Newlon v. Armontrout*, 693 F. Supp. 799, 808 n.4 (W.D. Mo. 1998).

[44] Weaver first filed on April 18, 1996, six days before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996. Even though Weaver had exhausted his state remedies, *Lawrence v. Florida*, ___ S.Ct. ___, 2007 WL 505922, *4 (Feb. 20, 2007), the district court erroneously dismissed the petition without prejudice believing that since Weaver had filed a petition for writ of certiorari in this Court, it "lack[ed] jurisdiction of the instant action until the Supreme Court has had an opportunity to pass on the matter." *Weaver v. Bowersox*, No. 4:96-CV-774 (CAS) (E. D. Mo. July 1, 1996). After this Court denied certiorari, *Weaver v. Missouri*, 519 U.S. 856 (1996), Weaver refiled his *pro se* petition on November 12, 1996. Since Weaver properly filed a fully exhausted petition prior to the effective date of the act, he submits that § 2254(d) is inapplicable. *Lindh v. Murphy*, 521 U.S. 320 (1997) (AEDPA is not applicable to cases that were pending prior to the effective date of the act).

the meaning of § 2254(d)(1)] if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." Both prevailing opinions in *Williams* illustrate the process for determining the reasonableness *vel non* of a state-court decision under this construction of § 2254(d)(1). Those opinions examined the state court's decision rejecting Williams' ineffective-assistance-of-counsel claim and discovered that it deviated from the analysis required by *Strickland v. Washington*, 466 U.S. 688 (1984), in two ways that rendered the state court's application of *Strickland* unreasonable. First, the state court unreasonably applied *Strickland* when it "relied on the inapplicable exception" to that decision's prejudice inquiry announced in *Lockhart v. Fretwell*, 506 U.S. 364 (1993). *Williams*, 529 U.S. at 397, 413-15. Second, the state court unreasonably applied *Strickland* when it "failed to evaluate the totality of the available mitigation evidence . . . in reweighing it against the evidence in aggravation." *Williams*, 529 U.S. at 397-398, 415-16.

Consistent with the example set in *Williams*, this Court's subsequent decisions have demonstrated that the "unreasonable application" analysis required by § 2254(d)(1) is often driven by two central factors: the content of the state court opinion under review, and the nature of the federal rule the state court was obligated to apply. In *Early v. Packer*, 537 U.S. 3 (2002), the Court underscored the importance of the content of the state court's opinion as an indicator of either the state court's faithfulness to this Court's holdings, or its unreasonable deviations therefrom. There, the Ninth Circuit's grant of relief under § 2254(d)(1) on the basis of several assumptions it made about the state court's analysis was reversed because the actual content of the state court's opinion did not support those assumptions. Explaining the reversal, this Court made clear that the state court's adjudication of a constitutional claim will survive § 2254(d)(1) "so long as neither

the reasoning nor the result of the state-court decision contradicts" this Court's "cases." *Early*, 537 U.S. at 8. On the one hand, a state court need not take extra care to issue "formulary statement[s]" demonstrating its compliance with this Court's precedents; on the other hand, for a state court's federal constitutional adjudication to obtain insulation under § 2254(d), the "fair import" of the state court's opinion must be faithful to the rules laid down by this Court. *Early*, 537 U.S. at 9; *see also Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (reversing a grant of relief where the court of appeals' findings under § 2254(d) were not borne out by the actual content of the state court's decision but were the product of a "readiness to attribute error" to the state court that was "inconsistent with the presumption that state courts know and follow the law").

The principles articulated in *Early* are reflected in other § 2254(d) decisions. For example, in *Wiggins v. Smith*, 539 U.S. 510 (2003), it was the content of the Maryland Court of Appeals' opinion rejecting Wiggins' ineffective-assistance-of-counsel claim that revealed the state court's unreasonable failure to consider whether the evidence known to Wiggins' trial counsel would have led a reasonable attorney to conduct further investigation. *Wiggins*, 539 U.S. at 527-28 (citing *Wiggins v. State,* 352 Md. 580, 609, 724 A.2d 1, 16 (1999)) ("The state court merely assumed that the investigation was adequate . . . The Court of Appeals' assumption that the investigation was adequate thus reflected an unreasonable application of *Strickland*"). Likewise, in *Bell v. Cone*, 543 U.S. 447 (2005), the fact that the "State Supreme Court's reasoning in this case closely tracked its rationale for affirming the death sentences in other cases in which it expressly applied a narrowed construction of the same . . . aggravator" convinced this Court that the state court had not ignored the mandate of *Godfrey v. Georgia*, 446 U.S. 420 (1980), notwithstanding the

absence from the state court's opinion of any express indication that it had applied that mandate.

The nature of the relevant constitutional rule has also played a role in shaping this Court's approach to § 2254(d)(1) analysis. This was articulated most expressly in *Yarborough v. Alvarado*, 541 U.S. 652 (2004), where the Court explained that, for purposes of § 2254(d),

> the range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.

Yarborough, 541 U.S. at 663-64 (citing *Wright v. West,* 505 U.S. 277, 308-09 (1992) (Kennedy, J., concurring in the judgment)).

Some rules are truly general in both formulation and operation, such that their application by state courts is circumscribed only by a requirement that they remain true to a broadly framed constitutional principle. *See, e.g.*, *Lockyer v. Andrade*, 538 U.S. 63 (2003) (explaining that relief from a "three strikes" sentence was unavailable under § 2254(d)(1) because the Eighth Amendment "gross disproportionality principle" lacks "precise contours"). Other rules, however, are general in their statement of a constitutional rule but acquire significant specificity through the analytical method that this Court has fashioned to govern their application. The rule of *Strickland* is perhaps the best known (but, as discussed below, certainly not the only)

example. Its rule – that a prisoner claiming ineffective assistance of counsel must show "that counsel's performance was deficient," and that "the deficient performance prejudiced the defense," *Strickland*, 466 U.S. at 687 – is paradigmatically general. Yet the reasonableness of a state court's application of the rule for § 2254(d)(1) purposes is ordinarily not difficult to measure. This is so because *Strickland* adjudication is informed by a well-developed set of methodological guideposts which serve the critical function of ensuring that the general rule is brought to bear in particular cases through structured, guided and deliberate examination of the relevant facts as they relate to the Sixth Amendment interests which the rule was intended to protect. *See, e.g.*, *Strickland*, 466 U.S. at 689 (a reviewing court must make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time"); *Williams*, 529 U.S. at 397-98 (a reviewing court must "evaluate the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding – in reweighing it against the evidence in aggravation"); *Wiggins*, 539 U.S. at 527-28 (a reviewing court "must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further").

B. The Missouri Supreme Court Unreasonably Applied the Relevant Due Process Rule.

Like the rule of *Strickland*, the due process rule governing prosecutorial penalty-phase arguments consists of a fundamental constitutional principle and a set of well-defined guideposts for its application to the facts of specific cases. The due process standard prescribed by *Donnelly*, *Darden* and *Romano* is whether the prosecutor's remarks "so infected the sentencing proceeding with unfairness as to

render the jury's imposition of the death penalty a denial of due process." *Romano*, 512 U.S. at 12 (citing *Sawyer v. Smith*, 497 U.S. 227, 244 (1990); *Darden*, 477 U.S. at 178-81); *see* Part II *supra*. This Court's decisions make clear that in applying this standard, a reviewing court must be attentive to certain factors and modes of analysis. As a general matter, a court must evaluate the alleged due process violation in light of the "entire proceedings." *Donnelly*, 416 U.S. at 643.[45] More specifically, the court should consider: (1) the prosecutor's statements (including whether those statements implicated one or more other specific constitutional rights of the accused, were specific or ambiguous, were spontaneously made or chosen with calculation to convey the offending message, were isolated or pervasive, and were technically accurate or actually misleading); (2) whether defense counsel's own arguments invited the offending remarks or effectively countered them; (3) whether, and if so, to what extent, the trial court's instructions mitigated the effects of the prosecutor's remarks; and (4) whether the weight of the evidence on the question the jury was required to resolve was sufficiently overwhelming to reduce the likelihood that the jurors were improperly influenced by the offending remarks.

The Missouri Supreme Court conspicuously failed to follow these methodological guideposts – or any objectively reasonable facsimile thereof – in adjudicating Weaver's federal constitutional claim. Nowhere in its discussion of the claim did it give any indication that it acknowledged either the federal due process nature of Weaver's contentions or the process that this Court has developed for

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[45] *See also Darden*, 477 U.S. at 179 ("It is helpful as an initial matter to place these remarks in context"); *id.* at 181 n.13 (responding to a dissenting opinion by emphasizing that the state court rejected Darden's claim "after a careful review of the 'totality of the record,'" and that the district court rejected the claim "after a 'thorough review of the record'") (internal citations omitted).

analyzing such contentions. *See* Pet. App. A-232 (citing *State v. Armbruster*, 641 S.W.2d 763, 766 (Mo. 1982)) (stating the rule to be applied as "[t]he trial court has considerable discretion in allowing argument of counsel, and the rulings are reversible only for abuse of discretion where argument is plainly unwarranted"); *id.* at A-237 ("Our review of the penalty phase arguments discloses that these arguments are reasonable").[46] While *Early* establishes that a state court's failure to expressly cite this Court's precedents is not necessary to bring § 2254(d)(1) into play, *Early* also makes clear that the "fair import" of the state court's opinion must reflect faithfulness to the analysis prescribed by those precedents. The fair import of the Missouri Supreme Court opinion here reflects precisely the opposite.

The state court's initial deviation from the path marked by this Court's precedents was its failure to consider the totality of the record, or even the totality of the remarks on which Weaver based his due process claim. Of the five categories of remarks recognized by Judge Melloy in his opinion for the Eighth Circuit majority – all of which were derived from the same record and contentions that were before the state court – only two (categories (2) and (4)) are addressed in the state court opinion. The opinion reads as if the remarks in the remaining three categories either were not uttered by Westfall or were not challenged by Weaver. But they were.

No "readiness to attribute error," *Visciotti*, 537 U.S. at 24, is necessary to discern the state court's gross departure from accepted due process analysis in this case. The Missouri court's opinion contains tangible evidence that it ignored or overlooked important parts of the "totality" of

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[46] While the state court did mention the Eighth Circuit's decision in *Newlon*, it did so only in a cursory attempt to distinguish the specifics of the prosecutor's arguments in the two cases. Pet. App. A-235.

Westfall's challenged remarks. In part IV.C. of its opinion,[47] the court stated that "Weaver puts forth a collection of allegedly improper arguments made by the state during the punishment phase . . . " Pet. App. A-236. The opinion goes on to identify two of the prosecutor's arguments speculating about who else Weaver may have killed if circumstances had allowed; then it says, "Finally, [the prosecutor] argued that the death penalty would be a deterrent." *Id.* at A-237. Weaver's objection to the prosecutor's deterrence argument, however, was far from the "[f]inal[ ]" remark he challenged before the state court. He challenged three more, including the prosecutor's particularly offensive "war on drugs" remarks.[48]

Moreover, the state court's opinion – which looked only to whether the trial court "abuse[d] [its] discretion" by allowing argument that was "plainly unwarranted," Pet. App. A-232 – reflects no consideration of the other factors this Court has identified as components of appropriate analysis of a due process claim. The opinion contains no

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[47] Weaver raised his challenges to the prosecutor's arguments in Claim IV of his state-court brief and organized the factual allegations and legal arguments supporting those challenges in subdivisions IV.A through IV.C. The state court tracked this organization in its own opinion, such that part IV.A. of the opinion addressed part IV.A of the brief, and so on.

[48] *See Bell v. Cone*, 543 U.S. at 460-61 (Ginsburg, J., joined by Souter and Breyer, JJ., concurring) ("This Court's opinion . . . does not grapple with the following scenario: A state prisoner petitions for federal habeas review after exhausting his state remedies. In the anterior state proceeding, the prisoner raised multiple issues. The state court, in disposing of the case, left one or more of the issues unaddressed. There would be no warrant, in such a case, for an assumption that the state court, *sub silentio*, considered the issue and resolved it on the merits in accord with the State's relevant law. Nothing in the record would discount the possibility that the issue was simply overlooked. A federal court would act arbitrarily if it assumed that an issue raised in state court was necessarily decided there, despite the absence of any indication that the state court itself adverted to the point").

indication that the state court considered whether Westfall's arguments implicated any other specific constitutional rights, or whether they were pervasive, unambiguous, calculated or misleading. Likewise, the opinion does not reflect any evaluation of whether defense counsel was able to counter the offending remarks, or any analysis of the weight of the State's case for death as bearing on the likelihood that the jury would have been influenced by the prosecutor's arguments. And while the state court did note the trial court's curative instruction in one instance of the prosecutor's invocation of his status as elected district attorney, it did so only in isolation, without any indication that it considered the overall performance of the trial judge in overruling or sustaining defense objections to the prosecutor's numerous objectionable remarks or in fashioning instructions adequate to undo the damage done by those remarks to which objections were sustained. Pet. App. A-233. In short, if the state court was adhering to any rule, it was neither the rule this Court laid down in *Donnelly*, *Darden* and *Romano*, nor an objectively reasonable facsimile of that rule.[49]

The objective unreasonableness of the state court's decision is the more apparent if that decision is compared with what an analysis conducted according to this Court's precedents would look like. Such an analysis would recognize that every guidepost which the Court has provided for evaluating prosecutorial misconduct under the Due Process Clause points to the recognition that Westfall's closing arguments were of the extreme sort that infect a trial with radical and unrelieved unfairness. For example:

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[49] While the argument set forth herein proceeds under § 2254(d)(1)'s "unreasonable application" clause, the state court's complete failure to follow – or even roughly parallel – the analysis this Court has prescribed also implicates § 2254(d)(1)'s "contrary to" clause. *See, e.g.*, *Williams*, 529 U.S. at 405 ("A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases").

- Far from involving only isolated improprieties, Westfall's two closing arguments featured a constant torrent of prejudicial tactics, running the gamut from attempting to overawe the jurors' judgment by references to Westfall's responsibility and experience as elected prosecutor in choosing to demand a death sentence for William Weaver; to telling the jurors to forget about William Weaver as an individual and sentence him to death in order to send a message to all the drug scum who "are taking our streets away from us"; to urging the jurors to "fight back" and do their "duty" like soldiers in a war who can find the "courage" to "kill him now" if they would only follow General Patton's admonition to reach down and put their hands in the goo of their murdered buddy's ruined face;

- Far from being spontaneous, these remarks were pre-planned, recycled from two previous trials, and defiantly delivered despite full knowledge that the Eighth Circuit, not two months earlier, had found a nearly identical set of arguments unconstitutional in another capital case tried by Westfall;

- The challenged remarks were specific, not ambiguous, in urging the jury to: view death as a sentence they, like soldiers, were duty-bound to mete out; give weight to the prosecutor's authoritative judgment that death was the only "right punishment" in this case; sentence Weaver to death not as anything "personal" but because a death sentence was necessary to keep drug dealers from capturing the streets and ruling them according to the law of the jungle; and forego reasoned, moral decision-making in favor of

"reach[ing] down into your belly, because that's where the death penalty comes from;"

- The challenged remarks were not merely emotionally inflammatory but also repeatedly implicated Weaver's independent Eighth Amendment right to be sentenced on the basis of his individual characteristics, and they contained coded allusions to Weaver's race;
- Defense counsel, for her part, neither invited the prosecutor's misconduct (a considerable portion of which occurred before she ever rose to speak at the penalty phase), nor effectively countered it (in part because an equally considerable portion occurred after her opportunity to argue had ended);
- The trial court's instructions were too little, too late, and, if anything, the trial court's sparse interventions despite repeated objections only reinforced through implicit endorsement the damage done by the prosecutor's improper arguments; and
- This was a penalty trial in which considerable mitigating evidence was presented on the defendant's behalf and in which the prosecution's evidence for death was far less likely to overwhelm the jury than was the sheer breadth, volume, variety and audacity of impermissible argument delivered by the prosecutor.

These are the factors that the Missouri Supreme Court should have considered under this Court's decisions in *Donnelly*, *Darden* and *Romano*. And these are the conclusions that the factors compel when they are considered in the light of the record before the state court. If the state court had applied the clearly established due process

rule according to the guideposts this Court has supplied, the only objectively reasonable decision it could have reached is that Weaver's right to a fair penalty trial was violated, and that his death sentence was due to be vacated.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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